CONSULTATION DOCUMENT ON EMPLOYMENT STANDARDS, 1986

DEPARTMENT OF LABOUR
PROVINCE OF NEW BRUNSWICK

OCTOBER, 1986

(Also available in French)

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Ladies/Gentlemen:

In keeping with the Department of Labour's policy to consult thoroughly with all interested groups and individuals prior to advancing for consideration to Government any suggestions for modifications of existing legislation administered by the Minister of Labour, I am pleased to make available a discussion document prepared by this Department, pertaining to the Employment Standards Act.

The suggestions contained herein are intended to generate meaningful dialogue and input to assist the Department in formulating policy advice for the Minister of Labour. We intend to bring issues forward for the Minister's consideration early next year with a view to introducing any appropriate amendments during the 1988 legislative session.

We would therefore appreciate hearing your views in the very near future so that the process can be made as meaningful as possible for all concerned.

Should this document give rise to questions, or the wish to discuss in greater detail the papers, my staff are available to provide assistance through the office of Mr. John Chenier, Assistant Deputy Minister.

Yours very truly,

John S. Roushorne
Deputy Minister

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Province of New Brunswick

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EXECUTIVE SUMMARY

Introduction

Every society maintains a high level of interest in, and a strong sense of appreciation for, the ongoing practical implications of its social institutions. In addition, people everywhere expect their social institutions to provide direction, fairness and continuity in their daily lives, and when those institutions are widely perceived to be lacking people also expect them to change.

The direction, fairness, and continuity of our social institutions are typically formalized and systematized through legislation. Generally speaking, legislation seen in this light has four purposeful functions:

1) legislation as a process for resolving disputes;

2) legislation as a process for maintaining historical continuity and doctrinal consistency by means of legal reasoning and reasoning by analogy;

3) legislation as a process for facilitating and protecting voluntary arrangements;

and,

4) legislation as a process for resolving acute social conflict.

Following this definition of legislation expressed in terms of functions, it can be seen that legislation more or less reflects an evolutionary legal process characterized by socially and historically appropriate rights, privileges, obligations, and

consequences of the law for individuals and groups of individuals. Thus, as society and the needs and concerns of people change, legislation eventually changes as well. For example, legal rights that are taken for granted in our society today, such as universal suffrage, did not exist only a few decades ago.

This definition of legislation as process certainly has broad application with respect to employment standards generally, and the **Employment Standards Act** in particular. To illustrate this, one only has to recall that the existing **Employment Standards Act** was founded on various pieces of related legislation so as to provide workers in New Brunswick with a more composite and historically relevant body of employment standards legislation.

Subsequent to the proclamation of the **Act**, however, the world of work continued to undergo profound and rapid change as society itself changed. Rather than elaborate on these changes here since they will be discussed in some detail throughout this document, suffice it to say that such changes have had an equally profound and rapid effect on many of the provisions in the **Act**.

For this singular but important reason then, the Department of Labour has prepared this consultation document containing a series of papers to draw attention to a number of social change issues which have particular relevance to the world of work, and

which would appear to require some measure of legislative redress. Each issue is examined separately and in varying degrees of detail with special emphasis given where necessary to how each issue affects both the employee and employer communities, as well as government. Following this, each paper concludes by offering for consideration one or more proposals for legislative action.

As an indication of how these proposals might appear in the **Employment Standards Act**, and for ease of reference to the **Act**, the Department has presented each proposal in draft legislative terms. By doing so, it is hoped that this consultation document will enable readers to assess both the policy implications and the technical applications of the proposed modifications.

As a final note, readers are asked to keep in mind when reading this document that each paper deals with issues the Department of Labour feels are worthy of broad discussion and consultation. For this reason, the value of each paper and any possible departmental response to each issue will ultimately stem from the discussion and consultation process itself.

Highlights of Major Issues and Proposed Action

- Wage Earner Protection
  - . employee wages are largely unprotected at employer bankruptcy or insolvency.
  - . federal legislation constrains recovery of employee wage arrears.

- it is proposed a deemed trust provision covering wage arrears in such situations would improve wage recovery, without conflicting with federal legislation and at no cost to employers, employees, and government.

- Technological Change
  - public debate indicates increased concern by employees over numerous employment-related consequences surrounding the introduction of technological change into the workplace.
  - generally speaking, these consequences stem from the timing of the introduction of the change.
  - to balance employers' needs for technolgocial advance and employees' needs to adjust to such advances, it is proposed that group termination legislation be extended to cover the nonunionized sector thus enabling the Minister of Labour to assist.
  - all employers receiving provincial financial assistance in respect of technological change be required to enter into Employment Adjustment Planning Agreements.

- Domestic Workers
  - because individuals hiring domestic workers are not defined as employers under the Employment Standards Act, these workers are not protected by the statute.
  - in some cases, this exclusion places an unwarranted burden on the workers involved.
  - it is proposed a person responsible for the employment of persons in his private home be considered an employer, excluding situations involving the care of a child, the ill, the aged or the infirm.

- Part-Time Workers
  - entitlement thresholds limit the access to paid public holidays, vacation and weekly rest period privileges by part-time workers and employees working under flexible hourly arrangements.
  - to address these situations, it is proposed that conditions of time worked be made more flexible.

- Parental Leave
  - contemporary family practices raise questions concerning the adequacy and gender equity inherent to the existing maternity provisions, particularly as it relates to males and adopting parents.
  - it is proposed paternity leave and adoption leave be equated with maternity leave to the extent that a birth father or an adopting parent be entitled to an initial six (6) weeks of unpaid leave, and that both parents be entitled to a combined additional eleven (11) weeks of unpaid parental leave.

- Paid Public Holidays
  - the average number of paid public holidays across Canada is 6.9 days.
  - any additional day suggested would need to coincide with existing business practices and the economy in general.
  - it is proposed that Thanksgiving meets these criteria and could be an additional paid public holiday in New Brunswick.

- Unemployment Insurance
  - recent changes to the Federal Unemployment Insurance Act deem termination payments as earnings for purposes of determining eligibility for unemployment insurance benefits.
  - under this Act, weekly earnings received during the standard waiting period are deducted from unemployment insurance benefits in a manner less detrimental than a lump sum payment.
  - it is proposed pay-in-lieu of notice be paid in two equal weekly installments and that the payment of outstanding pay be made not later than twelve (12) days following the date of termination of employment.

- Sick Leave
  - provisions are presently nonexistent under the statute with regard to sick leave
  - it is proposed that protection be provided to employees in cases of occasional contagious illness up to thirty (30) days of unpaid leave.

- Bereavement Leave
  - provisions are presently nonexistent under the statute with regard to bereavement leave.
  - it is proposed that workers be permitted to take an unpaid leave of absence up to five (5) days at the death of spouse or child, and three (3) days at the death of other close relatives.

- Violation of a Provincial or Federal Statute
  - many statutes presently require a person to divulge information surrounding actions contrary to said statutes without protecting employees against loss of employment.
  - it is proposed protection be given through the unjust dismissal provision under the Employment Standards Act.

- Authorized Leave of Absence
  - concerns have been expressed over the lack of protection against any loss of seniority while on authorized leave of absence, especially with regard to maternity leave.

- it is proposed that where a seniority system exists in the workplace, seniority would continue to accrue to an employee who is granted leave of absence under the Employment Standards Act in the same fashion he would have, had he worked.

WAGE EARNER PROTECTION

PREFACE

Available information (see Appendix "A") indicates that the annual sum of unpaid wage arrears due individual New Brunswick workers in circumstances of employer insolvency is substantial. In addition, experience shows that the recovery of wage arrears by, or on behalf of, unpaid workers in the Province has been both costly and less than satisfactory. For example, with respect to the Vacation Pay Recovery Fund alone, Appendix A shows that government expenditures for claims between August 1982 and April 1983 amounted to $350,000. This depleted the existing Fund in nine months, and left a total of over $38,600 in outstanding claims. This experience, together with the fact that the Province could not recover its expenditures, caused government appropriations to the Fund to cease.

These facts suggest that existing federal and provincial legislation provide either inadequate or costly wage earner protection at employer insolvency, thereby warranting a thorough review and assessment of that legislation and any attendant retrieval mechanisms with a view toward recommending more adequate action, legislative or otherwise.

This review paper consists of three sections. Section One examines in some detail existing federal and provincial wage earner protection legislation and the adequacy of that legislation.

Section Two examines some of the basic principles and jurisdictional issues surrounding wage earner protection.

Section Three provides for consideration a provincial wage earner protection option and details the legislation and action that option would require.

SECTION ONE

Wage arrears due New Brunswick workers in cases of employer insolvency are presently largely unprotected.

Existing Federal Legislation

The federal government currently has little substantive legislation which deals specifically with wage protection. Indeed, as the 1985 Ontario Commission of Inquiry into Wage Protection in Insolvency Situations (the so-called "Brown Report") discovered,

> The only (federal) legislation which represents a significant exercise of federal legislative power ... is the **Bankruptcy Act**, and only one provision in that Act deals with wage protection.
>
> -ibid.: 26

More specifically, the Brown Report goes on to note that,

> Section 107(1)(d) of the **Act** protects wages for services rendered during three months next preceding the bankruptcy to the extent of $500.00 ..., and accords them an unsecured but preferred status fourth in line after the claims of secured creditors.
>
> -ibid.: 26

As a consequence then, because federal legislation takes precedence over provincial legislation in matters related to bankruptcy, the option does not exist for a province to assign legislatively a higher priority to unpaid wage arrears

whenever a bankrupt employer's assets are distributed to creditors pursuant to the **Bankruptcy Act (Canada)**.

The only other federal legislation relevant to the recovery of unpaid wage arrears in cases of employer insolvency is the **Bank Act**. In particular, Section 178 of this **Act** allows for the creation of a security interest for unpaid wages up to a maximum of three months' wages where bank loans are secured by certain types of security.

Notwithstanding the provisions in Section 178 of the **Bank Act** covering unpaid wage arrears, any attempt by a province to secure an interest in a bankrupt's property for earnings not covered under Section 178 (e.g., severance pay) would prove ineffective against the claims of such preferred creditors as banks. Similarly, any attempt by a province to extend a security interest for more than three months to cover wage arrears would be equally ineffective.

As suggested above, federal legislation does not currently provide adequate wage protection for employees. There are three major reasons for this inadequacy. First, insolvent employers generally do not have sufficient assets to pay the claims of secured creditors, let alone pay the wage arrear claims of unsecured employees.

Second, Section 107 of the **Bankruptcy Act** does not apply across the board to insolvent employers whose employees have accumulated wage arrears. For example, it frequently happens that secured creditors do not petition debtor employers into

bankruptcy, but rather, simply appoint receivers. Therefore, because a bankruptcy has not formally occurred, wage protection provisions under the **Bankruptcy Act** cannot be invoked; nor can similar provisions under the Province's **Wage-Earners Protection Act**, as will be discussed later.

Finally, even in those cases where a bankrupt employer's assets are sufficient to satisfy to some extent employee wage arrear claims, the requirement under the **Bankruptcy Act** that secured creditors be paid first means that payments for unsecured wage arrears are usually delayed.

Existing Provincial Legislation

The Province of New Brunswick currently has in place several pieces of legislation which contain provisions applicable to the recovery of wage arrears owed to employees.

One such piece of legislation is the **Mechanic's Lien Act**. According to Sections 3, 4, 6, 8 and 10 of this **Act**, and specific subsections contained therein, a statutory lien can be registered by, or on behalf of, an unpaid employee attaching the property the employee is working on, or has worked on, for purposes of recovering the employee's wage arrears relative to that work. Furthermore, under this **Act**, an employee's capacity to realize financial benefit from such a statutory lien can be enhanced through a court-imposed statutory trust covering all monies paid or owed to an employer in respect of work done by an unpaid employee during

the period for which the employee's wage arrears have accumulated.

While there are prescribed legal procedures and time limitations associated with statutory liens under the **Mechanic's Lien Act**, a claim for wage arrears is given priority under the **Act** over all other judgements, executions, assignments, attachments, garnishments, and receiving orders recovered, issued, or made after the employee's lien is registered, and is also generally given priority over all claims under conveyances, mortgages, and other charges.

Another piece of New Brunswick legislation which allows for the recovery of employee wage arrears through the statutory lien mechanism in the **Woodsmen's Lien Act**. According to Sections 2, 3, 4, 5, 6 and 7 of this **Act**, and various subsections contained therein, certain employees in the forest industry can claim against their employer for unpaid wages. Wage arrear claims under this **Act** are given priority over all other claims, except those of the Crown, the Farm Adjustment Board, and the Worker's Compensation Board. Also, and as was the case with wage arrear-related statutory liens under the **Mechanic's Lien Act**, there are time limitations associated with statutory liens under the **Woodsmen's Lien Act**.

A third piece of New Brunswick legislation pertinent to the recovery of employee wage arrears is the **Wage-Earners Protection Act**. According to Sections 1, 2, 3, 4, and 5 of

this **Act**, and various subsections contained therein, employees' wage (or salary) arrears are given priority claim over those of ordinary, general, and other preferred creditors, except with respect "to any assignment made under the provisions of any act of the Parliament of Canada relating to or respecting bankruptcy or insolvency".

For purposes of this report, the fourth (and major in terms of frequency of application) piece of New Brunswick legislation applicable to the recovery of employee wage arrears is the **Employment Standards Act**.

Although Section 77 of this **Act**, which specifically addresses the recovery of employee wage arrears, vacation pay or pay in lieu of vacation, and pay in lieu of notice of termination, through what basically amounts to an appropriation of government funds available for this purpose and a subsequent action by government to recover such appropriations, has not been proclaimed, other sections of the **Act** and various subsections contained therein are being used with success in situations of wage recovery where bankruptcy has not occurred, principally through the issuance of orders and certificates by the Director of Employment Standards or the Employment Standards Tribunal.

With respect to any provision covering the appropriation of government funds to reimburse employees for wage arrears at employer insolvency, it should be noted that such a provision existed under the now-repealed **Vacation Pay Act**. However, as

mentioned earlier, this "government will pay" approach did not work well. In particular, because the fund provided some protection to employees, the payment of vacation pay became the last concern for some insolvent employers. Indeed, some employers at the time publically stated they would not reimburse employees' vacation pay arrears while a government fund existed, thereby taking advantage of the fund. This negative approach, the publicity surrounding it, and the significant increase in the number of claims which quickly depleted the fund, were evidence of an emerging trend that insolvent employers might not be inclined to provide for unpaid vacation pay as long as those costs could be passed on to government.

Given this past experience, it is evident the existance of a fund would provide encouragement for insolvent employers not to pay and would lead to an increase in the incidence of unpaid wages. In addition, the establishment of the Vacation Pay Fund was seen to impose an unfair burden on taxpayers generally, and not on financially unstable employers where it should more properly fall.

On the basis of this discussion, it should be apparent that the difficulty with existing provincial wage protection legislation is not so much that it is nonexistent, but rather, that it is markedly ineffective in cases of employer bankruptcy. This should not be surprising, however, since in principle all matters related to bankruptcy fall solely within federal jurisdiction.

For this reason then, existing provincial wage protection legislation assumes, albeit implicity, that debtor employers have some financial capacity to pay employee wage arrears. Indeed, while in theory and in reality there is evidence this is true, one simple and important fact still remains. Neither federal or provincial legislation sufficiently addresses the problem of employee wage protection as a matter of priority in all employer insolvency situations.

The next section assumes that employee wage protection is a government priority as it seeks to examine and assess the principles and jurisdictional issues surrounding wage earner protection, and to develop a provincial wage protection policy statement.

SECTION TWO

The Principles of Wage Protection

The extent to which employees in New Brunswick accumulate wage arrears by virtue of nonpayment of wages by insolvent employers may not in the aggregate constitute a major financial problem. Nevertheless, for employees who, through no fault of their own, have wages owing, the arrears and their inability to collect, or to collect quickly, are significant.

From a policy perspective, the singular most important fact to consider here is the unique position employees find themselves in with respect to the recovery of wage arrears. That is, employees in the private sector always retain the potential to be **involuntary** and **unsecured** creditors of insolvent employers. Indeed, and as something of an aside, it is worth noting that there is some legislative precedence for this unique position of workers since employees in New Brunswick (and in other jurisdictions) typically are required to extend involuntary and unsecured credit for wages to their employers when taking up employment, usually for at least one pay period.

In situations involving employer insolvency, the financial implications for employees with wages owing are exacerbated by a range of indirectly related factors. For example, it is impossible for employees to establish a priori that wages are at risk during employment, thereby making it

equally impossible for employees to insure their wage losses in the event of employer insolvency.

The mandatory "waiting period" before unemployment insurance benefits are payable, in combination with nonpayment of wages, creates a severe economic hardship for affected workers.

Finally, unlike institutional creditors such as banks, employees with wage arrears are in the unenviable position of having extended credit to a single debtor, their employer, and therefore are unable to balance bad wage arrear debts against other good ones.

Accordingly then, and following the example established elsewhere in Canada and abroad, it is both appropriate and timely for New Brunswick to undertake to provide more adequate wage protection than currently exists.

While the substance of a New Brunswick wage protection policy is the subject of the following section, there are a series of principles which should guide the policy development process, and as such are deserving of special attention at this point.

Briefly stated, wage earner protection should at minimum be based on the following principles:

1) All employees are entitled to the wages and benefits they earn, notwithstanding employer insolvency;

2) In situations of employer insolvency, employees' wage and benefit arrears should receive statutory priority attention in the distribution of assets.

3) Employees' wage and benefit arrears should be recovered and distributed through a speedy, cost-effective, and sound jurisdictional and administrative procedure.

Given these guiding principles, what is needed in terms of broad policy objectives is a mechanism (or mechanisms) whereby employees' wage and benefit arrears can be protected:

1) with the maximum assurance of full recovery;

2) in a timely, enforceable, and easy-to-follow fashion;

3) without imposing an undue financial hardship on the employer community;

and;

4) without imposing an undue financial or administrative burden on the Province.

Because federal jurisdiction is of such over-riding importance to any provincial attempt to provide wage protection in situations involving employer insolvency, the question of the scope of jurisdictional (or constitutional) authority of New Brunswick in this matter is worthy of special and separate attention.

The Jurisdictional Issue

Briefly stated, and as the Brown Report points out, "the answer is that until the federal government acts, a substantial legislative authority exists" (ibid.: 24) for

provinces to act. Indeed, the Brown Report goes on to note that,

> At the present time, the only restriction on provincial legislation would be the enactment of a scheme of priority that would conflict with either Section 107 of the **Bankruptcy Act** or Section 178 of the **Bank Act**, since those provisions represent the only exercise of the federal government's legislative power, with respect to wage protection.
>
> ibid.: 24

The Brown Report does, however, suggest a possible conflict with federal legislation which establishes other priorities like Canada Pension Plans and Unemployment Insurance trusts for employee contributions deducted at source.

This restriction notwithstanding, and while Section 91 (21) of the **Constitution Act, 1867** gives the federal government authority over matters involving bankruptcy and insolvency, Section 92 (13) of the **same Act** gives a province authority over matters involving property and civil rights. As a result, legislation which deals with wage protection can come under the authority of both sections of this **Act** and, as such, represents what is commonly referred to in constitutional law as the "double aspect doctrine".

The significance of the double aspect doctrine is that it clearly recognizes the potential for both levels of government to enact valid wage protection legislation. More

specifically, according to this doctrine, until the federal government creates conflicting legislation, provincial legislation is valid.

As noted earlier in Section One, only Section 107(1)(d) of the federal **Bankruptcy Act** addresses wage protection, and then only in terms of setting priorities for the distribution of bankrupt employers' assets. Thus, a province does not have the option of giving wage arrears a different priority in the distribution of assets at bankruptcy.

Federal wage protection legislation notwithstanding, it is not impossible for a province to enact its own wage protection legislation. The key to doing so is to avoid completely any conflict with federal legislation. Therefore, and as the Brown Report has determined, "the extent of the reach of Section 107(1) of the federal **Bankruptcy Act** must be considered" (ibid.: 27).

In this regard, the Brown Report specifies three major points of consideration. These are as follows:

> In the first place, s.107(1) of the **Bankruptcy Act** does not apply to all instances of insolvency. In many cases, creditors will appoint a receiver but do not petition the debtor into bankruptcy. Second, it does not apply to property not beneficially owned by a bankrupt. The **Bankruptcy Act** only seeks to apply to the bankrupt's estate. Therefore, where a bankrupt holds property "in trust" for another, that property does not form part of his estate and the provisions of the **Bankruptcy Act** do not apply to it.

> Third, it does not regulate the interests of secured creditors in property belonging to a bankrupt. By an express exclusion contained in Section 107(1), the rights of secured creditors are protected or rank ahead of the scheme of priorities established by that section.
>
> ibid.: 27

In addition to the **Bankruptcy Act**, the only other relevant federal legislation which supercedes provincial authority is the **Bank Act**. As was discussed earlier in Section One of this document, Section 178 of the **Bank Act** creates a security interest for unpaid wages to a maximum of three months' wages where loans are secured by certain types of security.

For this reason then, should a province attempt to provide through legislation a security interest in any wages, or types of wages, not currently included under the **Bank Act's** definition of wages (e.g., severance or termination pay), or to extend the period of security interest beyond three months, such an attempt would be legally ineffective against the interests of Section 178 security holders.

Notwithstanding this limitation on provincial action, the Brown Report also has determined that,

> Since the **Bankruptcy Act** excepts secured creditors from its scheme of priorities and does not apply to property which it is not part of the bankrupt's estate, the question arises: would the creation of a statutory lien in favour of employees or the creation of a statutory trust be operative in instances of bankruptcy?

> The answer is not clear; however, it would appear that a "trust" will not be affected, whereas a statutory lien securing unpaid wage claims would be inoperative in instances where Section 107 of the **Bankruptcy Act** applies.
>
> ibid.: 28

Furthermore, and based on Ontario case law, the Brown Report goes on to document the findings of the Ontario Court of Appeal in this matter, namely, that:

1) Provinces can create valid trusts by legislation;

2) A "deemed" trust is enforceable in bankruptcy proceedings;

   and;

3) By Section 47(a) of the **Bankruptcy Act**, property held in trust does not form part of the property of the bankrupt.

With respect to statutory liens, the courts have recently found (e.g., in the case involving Deloitte, Haskins and Sells Limited) provincial statutory liens to be inoperative by virtue of a conflict with Section 107(1) of the **Bankruptcy Act**.

On the subject of statutory trusts, the Brown Report (Appendix I) cites Armstrong as follows on the views of the courts:

(1) In a bankruptcy, section 107(1) of the **Bankruptcy Act** prevails over deemed trust obligations in other statutes that purport to give Crown claims a higher priority than they are assigned under Section 107(1);

(2) All deemed trusts, whether federal or provincial, are to be ignored in the distribution of assets upon bankruptcy, except those federal trusts that came into existance after, and contain explicit reference to Section 107;

(3) On the other hand, where a trust is created by provincial or federal statute that could also arise under the ordinary rules of law or equity, (and, in particular can be traced) Section 107 will not defeat the trust;

(4) If the property cannot be traced, effect will not be given to the trust, and the position is as in (1) and (2) above.

-ibid.: 23

With respect to nos. 1 and 2 above, it is worth mentioning two recent decisions by the Ontario courts. In two separate cases, it was the judgement of the courts that employees' claims for vacation pay on insolvency under Section 15 of the Ontario **Employment Standards Act** were affirmed, and that such claims take priority over the claims of secured creditors.

What is particularly instructive about both judgements is the efficacy they attach to the statutory trust provision contained in Section 15, namely;

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

Indeed, as the referee in one of the cases (National Bank Case) found,

> I would therefore characterize s. 15 of the Employment Standards Act, as creating a statutory trust for vacation pay accruing due to each employee which is secured by a lien and charge upon the assets as the amounts accrue due. As a statutory trust, this trust has some of the characteristics of both law and equity, and the security interest created by the lien and charge also has both legal and equitable aspects in respect to tracing the trust funds into the hands of a third party. Finally, the trust is deemed to exist and to be secured by the statute, and the validity of the trust is not in any way destroyed by the failure of the employer expressly to establish a separate fund, and the tracing remedy is available as if such a fund had been established and entered into the books of account in the ordinary course of business, whether or not in fact that was actually done.

It is worth mentioning that two other means of protecting employees' wages, namely a wage protection fund and establishing personal liability with respect to directors and officers of corporate employers, do not retain any potential for jurisdictional conflict.

Although the constitutional validity of a provincial wage earner protection fund has not yet been considered by the courts, the Brown Report points out that,

> Since provinces have a clearly established authority over all aspects of employment, except in relation to federal undertakings, provincial legislatures are free to establish a fund to compensate employees for wage loss.
>
> -ibid.: 32-33

Similarly, the Brown Report has also determined that, "legislation that establishes personal liability for directors and officers of corporate employers is within ... (a) provincial legislature's competence" (ibid.: 33), primarily because such legislation does not come into conflict with the **Bankruptcy Act**.

In summary then, under the **Constitution Act, 1867** provinces have the right to protect employees's wages as follows:

1) by creating a wage protection fund;

2) by securing unpaid wages through a "deemed" trust which would constitute part of every employee's employment contract;

   and;

3) by creating personal liability for the directors and officers of corporate employers.

The actions advanced in respect of improved wage earner protection presented in the next section are derived in part from the findings of the 1985 Ontario Commission of Inquiry into Wage Protection in Insolvency Situations (particularly as they relate to federal-provincial jurisdictional issues), or have otherwise been developed to supplement New Brunswick's existing **Employment Standards Act** and other relevant Provincial legislation, and to meet the wage protection needs of workers in New Brunswick.

SECTION THREE

In keeping with the wage earner protection principles and objectives outlined earlier in Section Two, this report provides for consideration the following proposals with respect to improving wage earner protection in New Brunswick.

Broadly stated, the major proposal being advanced for consideration is for employees' pay to be protected through a "deemed" trust provision contained in the **Employment Standards Act.**

The benefits of this approach to improved wage earner protection are three-fold. First, a deemed trust provision retains a strong sense of continuity and complementarity with respect to existing legislation concerning the prompt payment of wages. As a result, this provision should have limited impact to the extent that employers are not being asked for the first time to comply with payment of wages provisions.

Second, deeming pay to be in trust according to statute law minimizes considerably the risk of pay being held in arrears by employers, and thereby equally reduces the likelihood that employee claims for payment would be substantial.

Third, a deemed trust provision covering pay would be readily amenable to the administrative and enforcement provisions contained in the existing **Act**, and would therefore not be of any additional financial burden to the Province.

Indeed, if anything, such a provision could be of financial benefit since it retains a clear potential to reduce the number of cases presently brought before the Director of Employment Standards and/or the Employment Standards Tribunal.

Following from this broad proposal, four (4) specific actions involving changes to the present **Employment Standards Act** are advanced here for consideration. These are as follows.

First, that Section 35(4) of the **Act** be repealed in its entirety, so as to give broader and more complete protective coverage to employees in the Province. As stated earlier, because predecessor legislation existed with respect to the prompt payment of wages, expanding the coverage of the **Act** should be of little or no consequence.

Second, that the phrase "Subject to subsection (4)," in Section 35(1) be deleted, so as to capture fully the intent of this particular part of the **Act**.

Third, in the Definitions portion of the **Act**, that "pay" be defined to include "tips and gratuities"; and, that the term "lawfully" insofar as deductions from wages are concerned be defined to mean "deductions from wages made by an employer and accruing to the Crown".

Fourth, that Section 38 of the **Act**, being wage protection, be expanded with consideration given to adding the following provisions:

38.1(1) For purposes of subsection (2), pay shall include lawful deductions which have been made on behalf of employees but which have not been paid to the Crown.

38.1(2) Every employer shall be deemed to hold pay accruing to an employee in trust for the employee whether or not the amount therefore has in fact been kept separate and apart by the employer and the pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of accounts whether so entered or not.

38.1(3) Any assignment of pay or any portion thereof made after this section comes into force and used as security for the payment of either an employee or employer debt is invalid.

There is one final point worth making to close this report. The deemed trust provision covering wage earner protection is a middle-of-the-road approach in the sense that it should have fairly broad appeal in both the employee and employer communities, particularly because it does not require financial contributions from either party, as would be the case with a wage earner protection fund like that presently being considered by the federal government. Insofar as the Department is concerned, the deemed trust provision should be attractive because it more adequately protects employees' wages at employer insolvency, but without imposing any additional financial or administrative burden on the Province.

APPENDIX "A"
EMPLOYMENT STANDARDS LEGISLATION
WAGE RECOVERY ACTIVITY

FISCAL YEAR	LEGISLATION	VIOLATIONS/NO. OF EMPLOYEES AFFECTED	AMOUNT RECOVERED($)	AMOUNT NOT RECOVERED($)*
81-82	Minimum Employment Standards Act	799	67,173.50	48,523.91
	Vacation Pay Act	934	69,154.81	69,037.47
	Minimum Wage Act	232	13,116.26	1,330.97
	Totals	1,965	149,444.57	118,892.35
82-83	Minimum Employment Standards Act	1,405	85,303.43	110,531.65
	Vacation Pay Act	2,184	49,400.39	364,148.75**
	Minimum Wage Act	419	24,443.15	514.37
	Totals	4,008	159,146.97	475,194.77
83-84	Minimum Employment Standards Act	1,311	122,155.23	221,548.09
	Vacation Pay Act	1,506	170,142.05	60,476.12
	Minimum Wage Act	940	70,123.35	916.03
	Totals	3,757	362,420.63	282,940.24
84-85	Minimum Employment Standards Act	1,459	121,062.93	36,234.21
	Vacation Pay Act	986	55,720.87	9,449.65
	Minimum Wage Act	766	48,991.62	726.95
	Totals	3,211	225,775.42	46,410.81

* Amounts not recovered are due primarily to employer insolvency.

** Province paid out $350,000 from the Vacation Pay Fund to cover partially employees' claims not recovered.

Source: Employment Standards Branch
Department of Labour

TECHNOLOGICAL CHANGE

PREFACE

The New Brunswick legislature approved on June 16, 1985, a motion introduced by the Honourable D. Clark and seconded by the Honourable M. MacLeod, "that the matter of technological change, as it affects workers in New Brunswick, be referred to the Standing Committee on Law Amendments for study, public submissions, and recommendations of legislative action if appropriate".

Subsequent to this motion being approved, the Standing Committee on Law Amendments undertook to seek public input on the effects of technological change on workers and the workplace. Advertisements were placed in all newspapers throughout the Province and, as a result of public interest, twenty-four (24) written briefs were submitted and three (3) days of open hearings were held on November 20 and 21, 1985 and January 22, 1986.

Generally speaking, while public attention focused on how technological change is being introduced and regulated, specific issues brought to the attention of the Committee also served to illustrate just how divided workers and employers are with respect to technological change. In this regard, for example, workers and their representatives emphasized what they perceived as employer disregard for such issues as: job displacement; skill-twisting and deskilling; loss of pay; emerging occupational health and safety concerns; the

electronic monitoring of worker performance; the urgent requirement for retraining; and so on.

In contrast, employers mainly contested what they perceived as a growing encroachment by workers and government into the business management arena, the attendant loss of some degree of control by employers over business management affairs and, by extension, the potential decline of economic activity in New Brunswick as investment moved to less regulated or less employee-sympathetic jurisdictions.

Against the backdrop of this contrasting positioning by workers and employers, but fully recognizing that technological change is inevitable and, indeed, critical to New Brunswick's economic future, it was the Committee's opinion that government has a central role to play in ameliorating the concerns of both workers and employers. Toward this end, the Committee reported to the legislature in June 1986 with the recommendation "that government, in consultation with both employer and employee groups, and other interested parties, devise an appropriate policy on technological change, as it affects workers in New Brunswick and that such policy be tabled for consideration in the legislature."

Following the Committee's recommendation, and as a first step in discharging this responsibility, the Department of Labour has prepared for broad discussion and consultation purposes a working policy paper.

This working paper consists of three sections. Section One examines legislated definitions of technological change in current usage, sketches out the legislative steps taken in several jurisdictions to redress the negative labour force effects of technological change, and assesses the efficacy of such legislation.

Section Two examines the nature of technological change against the backdrop of the myraid of worker and employer concerns associated with it, and by doing so seeks to provide answers to four important and guiding questions:

1) Is our economy and our society in a position to ignore the potential, good or bad, inherent in technological change?

2) Do New Brunswickers sufficiently understand the profound changes being precipitated by technological change?

3) Does the environment presently exist in New Brunswick that is conducive to an **equitable** and **productive** adoption of technological change in the workplace?

and,

4) How can a broadly desirable and cohesive process of change be institutionalized in New Brunswick that would facilitate both the introduction and acceptance of new technology in the workplace, and consequently would ensure that the negative labour force effects of such action are minimized?

Section Three provides for consideration two major actions in respect of technological change.

SECTION ONE

Technological Change Currently Defined

The most widely entrenched legislative definition of technological change mirrors that contained in the Canada Labour Code, the British Columbia Labour Code, and the Manitoba Labour Relations Act, namely:

a) the introduction of an employer into his work, undertaking, or business of equipment or material of a different nature or kind than that previously utilized by him in the operation of the work, undertaking, or business;

and,

b) a change in the manner in which the employer carries on the work, undertaking, or business that is directly related to the introduction of that equipment or material.

Saskatchewan's Trade Union Act expands on this definition by including the following provision:

> the removal by an employer of any part of his work, undertaking, or business.

Existing Legislation

In addition to entrenching definitions of technological change in legislation, the jurisdictions cited above also have legislation in place which requires employers to provide employees with advance notice respecting technological change. The advance notice period is typically ninety (90) days prior to the date when the employer intends to implement the

technological change, except under the Canada Labour Code where one hundred and twenty (120) days is required.

With the exception of British Columbia, advance notice legislation generally requires employers to provide affected employees with detailed information on the following:

a) the nature of the technological change being introduced;

b) the date when the technological change is to be implemented;

c) the approximate number and type of employees likely to be affected by the technological change;

and,

d) the effect the technological change is likely to have on the terms and conditions, or security, of employment for the employees affected.

Also, where failure to comply with advance notice legislation can be determined, the Canada Labour Code provides that employers may be directed to refrain from implementing the technological change for a period not to exceed one hundred and twenty (120) days, while relevant provincial legislation usually provides for a ninety (90) day restraint period.

The Efficacy of Existing Legislation

Notwithstanding national and/or provincial advance notice legislation like that described above, plus the fact that in some jurisdictions collective agreements now contain provisions which address matters related to technological change, including measures designed to cushion the negative

effects for the employees affected, two simple and well documented truths are inescapable:

a) technological change always has altered, and will continue to alter, the nature of work;

b) it is inevitable, at least for the short to medium term, that technological change will either directly or indirectly precipitate some measure of employment dislocation.

In light of these two important observations, it should be evident that while advance notice legislation may be useful, it cannot stand alone as sufficient to address employees' concerns, particularly with respect to alterations in the nature of work and job dislocation. Indeed, what advance notice legislation by itself primarily does is provide some predetermined lead time before employees are actually affected by technological change. Similarly, insofar as employers are concerned, advance notice legislation by itself generally serves only to inject something of a "needless" time restraint into otherwise sound business planning practices.

In essence then, if advance notice legislation has a shortcoming for workers and employers alike it is that such legislation is not oriented toward any proactive and corrective action. Instead, its major focus is on specific technologies themselves and the precise timing of their introduction into the workplace and, as such, advance notice is unable to extend any legitimate, tangible, positive, and timely benefits to either workers or employers.

This criticism, while possibly extreme at first glance, does not imply that advance notice legislation is totally ineffective. Rather, it simply suggests that this kind of legislation by itself is not sufficient to address the full range of technological change issues. This being the case, the following section undertakes to build on the different situations which precipitated the introduction of advance notice legislation in several jurisdictions and the empirical evidence contained in briefs submitted to the Standing Committee on Law Amendments and, by doing so, lays the ground work for introducing technological change proposals in the final section.

SECTION TWO

The Nature of Technological Change

In order to define to the fullest extent possible this report's terminology and to provide a rationale for its approach and proposals, it is necessary to first present a brief introductory discussion on the nature of technological change and the broad implications this has for resolving the related concerns of workers and employers.

Advances in science and their accompanying technological results have always clearly demonstrated a marked capacity to bring about major social and economic change.

One integral activity of scientific advance is the scientific design process - the creative activity which seeks out new ways of doing things. In engineering, for example, this creative activity effects changes in our physical surroundings, so that technology can be seen as the result of creative engineering in the form of new machinery, processes, systems, and knowledge.

The other integral activity is the scientific design adoption process. The adoption of technology by business and industry is determined by a host of factors, but from an economic perspective, technology is adopted for two major reasons:

1) to improve the efficiency of producing existing goods and services;

and,

2) to produce new goods and services.

In this context then, technological change as opposed to technical change, is a "process" which includes both the development and the adoption of new technology. It is this second aspect of technological change, the adoption of technology, which ultimately is of broadest concern, because as new technology is diffused throughout the economy in the form of new products, processes, systems, and knowledge, workers' incomes and employment are affected, and employers' production levels and competitive advantage change.

The most immediate employment-related effect of adopting new technology involves changes to the nature of work, namely, the number, type, and mix of jobs available, and ultimately involves changes for the people performing work and/or providing services. At the risk of stating the obvious, however, it should be noted that the technological change process is totally determined by people. New technology is not an end in itself. Its value is only reflected in its adoption, and coping with this aspect of the technological change process severely tests the roles, rights, responsibilities, and mutual relationships of workers and employers.

It is probably widely understood by employers and workers that the external factors, for example, market conditions,

which shape their industries really do not provide a clear-cut choice between adopting or not adopting new technology. The important questions therefore have to do with the "process" of adopting new technology in ways which effectively and equitably deal with the legitimate (and, frequently, different) concerns of workers and employers.

On the one hand, there are well documented conflicts of interest between workers and employers over technological change. The extent to which this occurs is generally related to the magnitude of the labour force and workplace adjustments required, and advance notice is typically seen as a means to reduce such conflict. Whether it does, however, is questionable, given the continuing high level of worker concern over technological change in jurisdictions with advance notice legislation.

By focusing on new technology by virtue of some advance notice mechanism by itself, the adoption aspect of technological change, particularly as it affects workers, takes on an unnecessarily one-sided and static quality. In all too many cases, workers are effectively removed from the adoption process insofar as human resource planning is involved and, consequently have little or no impact on any subsequent organizational change. As a result, advance notice legislation by itself does not reduce management-worker confict over technological change, generally to the detriment of both parties, as well as to government which is often called in at the so-called "eleventh hour" and asked to bring

its relevant adjustment programs and services to bear on a wide range of complex issues and concerns that cannot quickly or easily be reconciled.

On the other hand, there is considerable evidence to suggest that sufficient common interest exists between management and workers which can form the basis for other complementary approaches. For example, the use of new technology in production systems typically demands a matching of managerial and organizational change as work is redefined and reallocated. The extent to which this can be successfully accomplished depends on the capacity of all parties affected to state and share common objectives, and to undertake new technology adoption in a way which reflects their often different, but equally legitimate, concerns.

Most industrialized countries are attempting to perfect their approaches to managing the adoption of technological change. Canada in general, and New Brunswick in particular, is no exception.

The New Brunswick government's efforts in this area show that while activities are directed toward the development and/or rejuvenation of business and industry through the use of new technologies, the government is no less committed to anticipating and avoiding potentially negative social and human effects. Indeed, in relevant policy and planning statements, the recurring theme is that government is determined to ensure that all New Brunswickers have the

opportunity to benefit from technological advance and that those workers who may be adversely affected are given adequate support during any adjustment period. Similarly, worker and employer groups have, at various times, voiced the same committment and, in some instances, recognized that committment on a joint basis through the collective bargaining process, through participating in various government-sponsored human resource adjustment programs, and other means.

As indicated earlier, however, adjustment efforts are directed mainly at the technologies themselves, or at the point when those technologies are introduced into the workplace. The major difficulty with this approach is that it effectively compresses a dynamic and potentially lengthy process of adopting technology into a comparatively static and brief adjustment time frame, namely the advance notice period. The net effect of this is continued worker apprehension about adopting technological change, and constraints on any forward movement with respect to their acceptance of same.

These observations, in combination with the views expressed in submissions to the Standing Committee on Law Amendments, lead to five closely interlocking conclusions:

1) In view of New Brunswick's record of productivity and competitive advantage, we cannot ignore the potential new technology has for our economic recovery.

2) To be successful, a technology-based productivity drive must involve timely, effective, and sustained cooperation among workers, management, and government throughout the technology adoption process.

3) The prerequisite for worker cooperation is not only the provision of advance notice, job security,

training and retraining, etc., but also their increasing capacity to participate in the broad adoption process involving technological change and their future as workers.

4) In order for new technologies to be adopted successfully, focus must also be given over to social and human considerations. Simply stated, new technology cannot be introduced and used effectively in an atmosphere of worker-employer confrontation, whether that confrontation is strident or silent.

5) In view of the evolving structural changes in industry and in the labour market and our continuing need to protect existing jobs and to generate new employment growth, worker-employer relations must, in the shared interest, shift quickly from a largely confrontational to what is basically a consensus model.

The foregoing are profound conclusions only to the extent that not all of them are readily understood or accepted by New Brunswickers. Nevertheless, acting positively on these conclusions is an integral part of the technological change process to the extent that such action provides the basic framework within which technological advances are being adopted elsewhere with marked success.

Given this brief discussion on technological change as "process", plus the five major conclusions outlined above, this report holds that in broad terms the technological change challenge must be addressed, not only in terms of the specific technologies involved and the timing surrounding their introduction into the workplace, but also, in terms of achieving the following social and human objectives:

1) to create and foster a climate for better understanding, acceptance, and sensible usage of new technologies for economic and employment growth and stability;

2) to ensure improved and more readily available short term adjustment measures such as training and retraining in order to manage more effectively the rapidly changing work environment;

3) to introduce measures to minimize the negative consequences and to maximize the sharing of benefits;

and,

4) to prepare New Brunswick industry and workers for a reasonably successful transition into the new technology era.

The unifying principle behind these objectives and, indeed, behind the entire technological change challenge is an unshakable concern for people. Decisions surrounding the adoption of new technology should be guided by the obvious but often ignored fact that, while modern equipment and modern production processes are important, nothing is more important than the people who, in the final analysis, make or break any productivity drive.

Guided by this principle, the next section presents for consideration a series of corrective actions designed:

1) to facilitate and nurture a more consultative and cooperative means of introducing change into the workplace, including technological change;

2) to develop improved adjustment assistance plans for threatened workers;

3) to improve the workplace environment in such a way so as to improve productivity;

and,

4) to set up mechanisms that would ensure some effective balance is struck between the need by the employers to adopt new technologies and workers' needs for secure and meaningful employment.

SECTION THREE

Proposed Actions

For the sake of presentational ease, the actions advanced for consideration in this section are grouped as follows:

1) Policy Action;

2) Legislative Action;

and,

3) Other Action

Policy Action

In keeping with both the general and specific findings of this paper as expressed in Section Two, and as a necessary supplement to the legislative action described next, it is proposed,

1) That any employer seeking financial assistance from the Province in support of introducing any technological advance into that employer's production process(es) be required, as a formal condition to receiving approval for such assistance, to enter into an Employment Adjustment Planning Agreement.

2) That any Employment Adjustment Planning Agreement be modelled after the public-private sector Human Resource Planning Agreements currently in place in some provincial industries and businesses.

3) That such Employment Adjustment Planning Agreements be entered into jointly by the employer, the affected employees or their bargaining agent, and such relevant government agencies as may be determined by government.

Legislative Action

Notwithstanding the practical value inherent in this Report's proposed policy action, it is felt that change in industry and business in general, and technological change in particular, sufficiently affects workers to the extent that some legislative action is warranted.

More specifically, it is felt that termination of employment when it is either directly or indirectly linked to the adoption of new technology should be addressed, as it is in other jurisdictions, within the broad context of group termination, and that protection should extend to both unionized and nonunionized workers. In addition it is felt a lengthier notice period would facilitate more effective adjustment services provided by the Department.

Therefore, it is proposed, that subsection 32(1) of the Employment Standards Act be amended to specify that no employer shall terminate or lay off permanently in a four (4) week period more than twenty-five (25) employees, if said employees represent at least twenty-five percent (25%) of the employer's labour force during the four (4) week period without first giving to the Minister of Labour, the employees affected, and where the employees affected are covered by collective agreement, in addition to and notwithstanding any provision in a collective agreement, to the employees bargaining agent, at least six (6) weeks advance notice of the termination or layoff.

Other Action

Since this entire consultation document is designed to deal with employment-related issues within the context of employment standards, no attempt has been made in this particular paper to address technological change from an industrial relations prospective. The only substantive protection available to employees against what might be perceived as unfair employer action surrounding technogical change is through unionization and ultimately a collectively bargaining agreement which is capable of providing same.

Concern has been expressed that employers may enter into collective agreements with unions knowing that such agreements will shortly thereafter be altered significantly by the effects of some previously undisclosed technological change. This issue is the subject of a companion paper which addresses technological change as it relates to unionized workers, and will be completed in the near future.

DOMESTIC WORKERS

PREFACE

Hiring a person to enter one's private home property in order to perform some type of work on those premises is an everyday occurrence in our society. In many of these arrangements, a specific project is defined that is to be completed within a particular time period, be it for example in carpentry, cleaning, electrical work or plumbing. These are not considered employer/employee situations, as the workers are in effect self-employed contractors hiring out their services, and fixing their own rates and hours to perform the job. They submit a bill for their services.

In other domestic arrangements, however, an individual is hired as an employee to perform specified duties, at specified hours, at a specified rate, and on a more or less regular basis. These individuals are loosely referred to as "domestic employees" and currently do not enjoy coverage under the **Employment Standards Act.**

The domestic employee sector is largely an informal working sector. Because of this, it is difficult to make any accurate determination of their numbers. For example, according to 1981 census figures, a total of 1472 domestic workers, including gardeners and caretakers, were reported in New Brunswick. For 1980, 1300 individuals reported employment incomes from domestic work, with an average annual income of $2,576. Only 245 of these people reported full-time full-year income in this. These figures represent both the

self-employed, as well as domestic employees in the general domestic work category.

One reason domestic incomes are seldom reported is due to the poor level of such incomes, and the perceived relative advantages of remaining income free as compared to personally claiming such wages for income tax purposes. A vehicle for formalizing this workforce is available, as Revenue Canada does have provisions for employers to submit remittances on behalf of any employee who works more than 19 hours per week. This procedure being not widely adopted at present, the inclusion of the domestic employee sector under the Act would therefore have the effect of flushing these people out of the closet for income tax purposes. The desirability of that option will have a profound effect on the future availability and cost of their services, and their future status as a sector of the labour market. This balance must be kept in mind when making any recommendation for inclusion under the statute.

One segment of the domestic work force has received some attention. That is the "imported" domestic or nanny, who is deliberately brought to this country to perform domestic duties. Formality exists concerning immigration matters. Issues surrounding this particular sub-group have been and still are the subject of debate and lobbying efforts of women's groups across the country, primarily with regard to changes to the immigration policy.

This paper will address the possibility of bringing any or all groups of domestic employees under the wing of the **Act**. While there may be many advantages, such as a minimum wage, paid vacations and public holidays, and weekly rest periods, there may be many repercussions, not only for the employers hiring them, but to the delicate balance of supply and demand that already exists in this informal working sector. Furthermore, the decision to include, or exclude, these workers from coverage under the **Act** must be supportable by the Canadian Charter of Rights and Freedoms.

While subsection 15(1) of the Charter calls for equal protection and benefit of all individuals before and under the law, there is a further provision allowing for exclusions. That clause, subsection 15(2), permits exceptions insofar as these would have as objective the improvement of conditions of disadvantaged groups or individuals. It must therefore be demonstrated that any exemption from coverage under the **Employment Standards Act** would be so justified. The employer group of a certain class of employees, in this case the domestic employees, must be deemed to suffer a disadvantage that might in some measure be ameliorated through an exemption of their employees under the legislation.

This review paper consists of two sections. Section One examines a broad range of issues relating to the employment of domestic workers and Section Two provides for consideration a proposed designed to make existing legislation more contemporary.

SECTION ONE

The Employer/Employee Issue

Who employs domestic employees? Also, would there be any general disadvantage this group suffers that might justify an exclusion of their employees under the Act?

To engage a domestic employee to perform duties in and about one's private home is essentially to purchase domestic services that one is either unwilling or unable to perform for oneself. An individual may hire for example a cleaning person, a gardener or chauffeur in order to gain more free time, and/or to achieve a certain lifestyle. Or, one may hire domestic help, or a companion or a sitter, from a real need for such services in order to cope with daily living. The aged and infirm would be two such employer groups. Also would working parents requiring child care services during their normal working hours.

Those employers hiring out of such need have a very limited variety of options currently available to them in New Brunswick to meet their domestic needs,

At present, for example, while there are licensed day care facilities in New Brunswick, these services tend to be available for a very limited group. The roughly 4000 licensed spaces have been estimated as meeting no more than 10% of the demand. Also they provide services on a limited schedule:

between 7:30 a.m. to 5:30 p.m. on weekdays only, and cater for the most part to preschool aged children requiring full day care within those hours. These formal arrangements tend to be concentrated in the more urban centers of the province. The less formalized out of home services may provide more flexibility in attending to children requiring part of the day care, for example school aged children for after school care, but again they tend to follow the same hours as the licensed services.

Taken together, both types of services still do not meet the need even for full day, regular hour, five day a week, child care requirements. The growing number of parents working shift work, part time hours, or in seasonal industries, have very limited child care options from which to choose. Domestic babysitting arrangments become a necessity for many such working parents.

Similarly, formalized arrangements to meet the coping needs of the aged or infirm tend to be limited. While there are special care and nursing homes available throughout the province, these tend to be last resort options. The preference of the majority of such individuals, also formally encouraged by government, is to remain in their own homes and communities as long as possible. Domestic help is a necessary aspect of this plan.

Hiring a person to come into one's home cannot be considered a luxury option for these employer groups. It

cannot be ignored that the fabric of our social order is changing, with the result of unprecedented number of working parents, and working single parents, requiring child care services. Neither can one turn one's back on the real, and demographically speaking, ever-growing needs of the elderly who find themselves living longer lifespans than their parents, and living these latter years often alone and outside the warm confines of the familiar nuclear family.

These employer groups are decidedly at a disadvantage currently, and in light of their growing numbers taken against the uncertain ability of formal structures within our society to rally to meet their needs, it would be unreasonable to consider any other option in this discussion than to provide for exemptions of their employees. Such an exemption would be more than justified under subsection 15(2) of the Canadian Charter of Rights and Freedoms.

On the other hand, for those employers hiring domestic help for reasons other than need, generally on the basis of a lifestyle decision, no such exemption is rationalized. Their employees are hired to perform a service that they have placed as a priority in their lives. Thus, these employees should be considered as any other employees. Their coverage under the Act should be unquestionably complete.

Extent of Exemption

The next issue in this discussion is to what extent should domestic employees of the elderly, the disabled or

working parents be exempted from the Act? Would there be some particular provisions of the legislation that would cause no hardship to either group, while providing a desired protection or a benefit to the employee?

Essentially the protections and benefits of the Act could be categorized as either monetary or nonmonetary. In the other nine (9) provincial and territorial jurisdictions which currently do provide selected employment standard protection for some domestic employees, it tends to be the non-sitting domestic workers who are covered. Likewise it is non-monetary provisions that are more often addressed. These would include the hours of work, rest periods, wage payment procedures, protections against unjust dismissals, and special protections for pregnant employees, and employees under 16 years of age.

What implications do these provisions hold for the employer and what benefits would they provide for the employee?

Hours of Work and Rest Periods - these outline the maximum hours of work an employee could work in any given time period at the minimum wage rate. Beyond those hours, an overtime wage rate applies. Likewise, a maximum number of working days per week is stipulated. As these types of domestic situations cannot realistically be limited to fall within the normal working week of other employees, it comes as no surprise that in most other jurisdictions this field is either wholly

exempted (5) or special hours of work clauses are outlined (4). Those domestic employees that tend elsewhere to receive the latter average, however, would not generally be those that have been identified for special exemption from the New Brunswick legislation. Because of the financial implications of the prescribed hours of work, together with the potential hardship implied by the days of rest section, this group of domestic workers should be exempted from such coverage.

Wage payment procedures and protections - these clauses unquestionably formalize the employer-employee relationship. They require the employer to keep payroll records, which can then be audited during an investigation. These requirements necessitate formal bookkeeping procedures, and allow agents of the government access to the employer's premises. This is too heavy a requirement of the employers in these contexts, and one that should not be imposed.

Furthermore it is questionable whether the implications of these requirements would even benefit the employees, some of whom prefer informal arrangements. There is some concern that if these requirements were introduced, the overriding desire to avoid formally declaring their earnings would either reduce the supply of such workers or place pressure on the employers to ignore the provisions completely. Thus exemption should be extended to include such coverage.

Unjust Dismissal - provisions are restricted to situations which relate to the employee requesting privileges or protections under the **Act** or whereby the employer dismisses an employee as a means of evading responsibilities under the legislation. Inclusion of this section, then, would only be meaningful in relation to the extent of other coverage under the **Act**.

Maternity Leave - while there is no doubt that the guarantee that the employee's job will be still available following the 17 week period of maternity leave is a desirable protection, in this case the prime concern lays with the stress placed by the provision on this particular employer group. The major impact of this provision for the employer is that a replacement would need to be found for a 4 month time period. Due to the personal intimacy of this employment situation, that is, the caring for children or aged or infirm individuals often on a one-to-one basis, it is questionable whether it would be ethical to place such an onerous requirement on this domestic relationship. It is proposed that the maternity leave provisions of the **Act** not apply to this group of domestic employees.

Employees Under 16 Years of Age - the **Act** stipulates limits on the hours worked per day and per school day, and likewise lists specific places of employment where these individuals may not work, as these are deemed unfavorable to their moral or physical development or health. Where exemptions of these provisions are desired, work permits must be obtained. In

terms of the present discussion, the concern would not be with the latter issues, but more with hours of work. Of particular importance would be the possibility of a young school dropout in a full time domestic job. Notwithstanding, the issue is already addressed by section 60(1) of the **Schools Act** which states,

> "Where the child is required by this Act to be in attendance at school, no person shall employ that person during school hours."

For the purpose of this **Act** a child is defined as a person between the ages of 7 to 15, inclusive. This reduces the need for concern over the potential of a child under 16 years of age in a full-time, full-week domestic job. In the light of the popularity of babysitting as an informal wage earning situation for youngsters in this age group, the implications of requiring work permits for children under 16 years of age would be so far-reaching as to border on the ridiculous. For these reasons the employment of children provisions of the **Employment Standards Act** need not apply to this group of domestic employees.

The provisions of the **Act**, loosely classified as "monetary" provisions, are seen as being more stringent upon the employer. These are provisions for minimum wage rates, paid public holidays, paid vacation and notice of termination (including payment in lieu). Essentially, all of these provisions rest on the minimum wage rate: if there was an exemption from that rate, the financial cost to the employer

of the other provisions would be reduced. The nine (9) other provincial and territorial jurisdictions have for the most part taken that route, either exempting the minimum wage rate completely for domestic employees (5), or establishing a special minimum wage rate (4) for them.

All of these same jurisdictions, except Saskatchewan, have then included certain domestic employees under the other monetary provisions. However, it must also be noted that latter jurisdictions do make distinctions between types of domestic employees: such that generally the "sitters" (either of children or the aged or infirm) are often exempted either in whole or in part from their legislation, while other domestic employees are those who receive most of the coverage.

With the lack of details on the economic and social profile of domestic employees of the aged, infirm and children and of their employers, the effects of applying the monetary provisions cannot adequately be ascertained. Given the strong possibility that some of these employers are on fixed or limited income, total exemption of this group of employers needs to be retained.

SECTION TWO

On the basis of the foregoing discussion, and notwithstanding the lack of complete and reliable data on domestics and their employers, this report favours the following measures:

1) retaining a total exemption under the **Employment Standards Act** for domestics in the employ of the aged, the infirm, and parents or guardians of minor children

and,

2) providing for the total inclusion under the **Act** for all other domestics through an expanded definition of employer.

Concepts Expressed In Legislative Terms

With this in mind then, it is proposed that the definition of employer under the **Act** be revised to read as follows:

> "employer" means a person, firm, corporation, agent, manager, representative, contractor or subcontractor having control or direction of or being responsible, directly or indirectly, for the employment of one or more persons, but does not include a person having control or direction of or being responsible, directly or indirectly, for the employment of persons in or about his private home, if that employment includes either or both of:
>
> (a) attending primarily to the needs of a child who is a member of the household;
>
> (b) attending primarily to the needs of an aged, infirm or ill member of the household.

COPING WITH FLEXIBLE ARRANGEMENTS:

THE CHALLENGE OF A VIABLE ALTERNATIVE

PREFACE

The intent of the **Employment Standards Act** is to provide a minimum set of working standards that would reach the majority of employees in New Brunswick. There have been recent trends in the labour force, however, along with other emerging trends, that are causing many employees to slip through omissions in a legislation that should be protecting them. While those exclusions were pertinent with regards to the labour force at the time the **Act** was drafted, today their relevance may no longer be supportable.

It is the rapidly growing part-time work sector, as well as the most recent employment option of the flexible hour sector, which are left without some of the protections intended for New Brunswick employees. This paper will address the possibility of rectifying such omissions.

Reassessing the Entitlement Thresholds

Currently, there are three specific sections within the **Act** which limit access to certain privileges on the basis of hours worked per day, or days worked per week, or month. Thus, eligibility for: paid public holidays, vacation time, and/or vacation pay, and for weekly days off is not presently universal for all workers in New Brunswick. Originally the intent was to allow the employer to exclude their small numbers of "occasional" part-time employees from these benefits. However, the numbers of such employees are no

longer negligible. Recent demographical analysis of this work force, brought poignantly to light by the 1982 Commission into Part-Time Work in Canada (known as the Wallace Commission), gives cause to reconsider the size and scope of the part-time work sector.

Part-time work, the Commission soon discovered, is no longer a sometime alternative. For example, while only 3.8% of Canadian workers in 1953 were employed in part-time jobs, this proportion jumped to a healthy 13.5% by 1981. The New Brunswick figure for that year was 13.4%. Furthermore, between the years of 1976-1982, approximately one-third of the growth in employment was due to the rise in numbers of part-time workers. In actual figures, an average of 1.5 million people monthly were employed in part-time jobs in Canada in 1981, and fully 2.4 million Canadians had held a part-time job at least once during that year.

On the other hand, the Commission also reported that part-time employees tend to receive lower hourly wage rates, to be eligible for far fewer legislative and employer offered employment benefits, and to work in situations with less chance of training or promotion than their full-time counterparts. While equivalent employment policies are desirable for both full-time and part-time workers, the first step is to examine the treatment of part-time workers within the context of provincial legislation, specifically the **Employment Standards Act.**

This brings us to the issue of entitlement thresholds for the earlier-mentioned protections of the Act. Simultaneously, while re-examining these sections, we will remain open to the possible exclusions of a new kind of work force that is emerging, the flexible hour workforce, so that they also would receive the benefits provided under the legislation.

Paid Public Holidays

The intent of paid public holidays provisions is to provide workers with a specific number of holidays during the year, which are occasions of particular cultural importance. Days of Rest legislation reinforces this principle by requiring most businesses to be closed during such days.

Currently, in order for an employee to "qualify" for a paid public holiday, there are a number of conditions, two of which are entitlement thresholds: the employee must have been in the employ of the current employer for at least 90 days of the previous 12 months, and must have worked on at least 15 of the previous 30 calendar days prior to the holiday itself.

The Wallace Commission pointed out two particular facts pertinent to the present dicussion. The first related to the short duration and high turnover of many part-time jobs: less than one third part-time jobs in 1981 lasted the full year. This could make it difficult for some part-time workers to meet the first entitlement requirement. Secondly, while 81% of part-time workers usually worked 4 weeks per month, 62% usually worked 3 or fewer days per week. In order to meet the

second qualifying condition, an employee would need to work at least a 4-day week. Thus, the majority of part-time workers would fail to qualify on the basis of this second condition. So too would the flexible hour, full-time employee working three 12-hour shifts per week.

The aim of the Act, as earlier mentioned, is to ensure a minimal base of employment protections for all employees. Thus, the removal of these two entitlement threshold clauses is proposed. It should also be noted that by eliminating these two qualifiers, a benefit granted under predecessor legislation would be restored resulting in employees working on a public holiday being paid time and one-half their regular rate, unless employed in the hospitality industry, or any continuous operation.

It will likewise be necessary to add a new subsection under section 21, which would provide for a prorating formula for determining the public holiday pay for the employee who has been employed fewer than the 30 calendar days usually taken for the reference period in determining the public holiday pay.

Thus the following changes are proposed.

Concepts Expressed in Legislative Terms

1. That subsection 18(1) be amended by deleting paragraphs (a) and (b), and substituting the following:

    18(1) This section does not apply to an employee who

(a) without reasonable cause fails to work his scheduled regular day of work preceding or following a public holiday;

(b) has agreed to work on a public holiday and, without reasonable cause, fails to report for and perform the work;

(c) is employed under an arrangement whereby the employee elects to work when requested to do so.

2. A new subsection be added under section 21:

21(3) Notwithstanding subsection (1) and subsection 18(2), where an employee has been in the employ of his present employer for fewer than thirty calendar days immediately preceding the public holiday, his pay for the public holiday on which he has not worked shall be at least equivalent to his earnings exclusive of overtime for the days on which he worked during the thirty calendar days immediately preceeding the public holiday over the number of days the employee would have worked had he been employed the full thirty calendar days immediately preceding the public holiday.

Vacation Time and Pay

Currently, only those New Brunswick employees who work in excess of 24 hours per week are considered for both vacation time and the 4% vacation pay. As part-time workers were defined by the Wallace Commission as those employees working fewer than 30 hours per week, a great majority of part-time workers in New Brunswick would be excluded from vacation pay and time privileges. Thereby this entitlement threshold should be repealed.

Likewise, in order for an employee to qualify for any vacation time, a total of 19 days per calendar month must be worked. This requires almost a 5 day work week on a regular

basis, which would eliminate the majority of part-time workers, as well as many 12 hour shift workers. Since the concept of the annual vacation is based on the principle that an employee should enjoy some time free of the working environment, with minimal income disruption, ineligibility of large numbers of the work force for this privilege is unjustified. Thus the 19 day per calendar month entitlement needs to be repealed.

An elimination of all entitlement thresholds under the vacation pay and time provisions of the **Act**, would necessitate the employer community to make some vacation scheduling re-adjustments, as well as to incur replacement costs of vacationing employees.

In regard to such extra costs to the employer group, we offer the observation often made by those employers who already do provide vacation time and pay entitlements to their part-time employees. They find that by treating their part-time workers equally with their full-time staff, their policy is well reinforced by high employee productivity and low employee turnover in their part-time sector. Several representatives of the employer community had made similar comments to the Wallace Commission.

Considering our opting for vacation entitlement for all employees, some would argue that giving equal time off to employees who worked a portion of the month is unfair treatment of full-time workers. However, we suggest that this

proposed method of determining vacation entitlement is a more viable alternative than pro-rating because of its ease of application from the perspectives of both employer and employee. Likewise, in the light of the emerging 12 hour shift and similar flexible working hour arrangements, we suggest the administrative headaches proffered by pro-rating alternatives will be avoided. Furthermore, as the full-time employees will still be receiving a fuller vacation cheque, we feel that unfair treatment to them is minimized in the above proposals.

An additional subsection is required under the vacation time provision to deal with broken periods in respect of vacation time off. As growing numbers of employees are requesting staggered vacation time off instead of two straight weeks, we must address the issue of how we expect the employer to administer the vacation pay. We would suggest a more flexible provision that would protect the employer from allegations that he or she contravened the legislation by not making one lump sum payment of vacation pay on the eve of the first part of the employee's annual vacation.

Thus, the following changes are proposed:

Concepts Expressed in Legislative Terms

1. That subsection 24(4) be repealed in its entirety.

2. That subsection 24(1) be amended by striking out, "on at least 19 days", and by adding "work" immediately after

"one" and preceding "day", such that the provision would read:

> 24(1) An employer, not later than four months after the vacation pay year ends, shall give to an employee a vacation that as a minimum is equal to one work day for each calendar month during the vacation pay year in which the employee worked, or two regular work weeks, whichever is less.

3. That subsection 26(2) be repealed in its entirety as all employees who worked during the vacation pay year would be entitled to some vacation time off, therefore triggering the application of section 25.

4. That a provision be added to section 25 to deal with broken periods in respect of vacation time-off:

> 25(3) Where by agreement of the employer and employee the vacation is to be taken in broken periods, the employer shall, at least one day before each vacation period be given, pay the employee an amount equal to the number of work days covered by the period times the equivalent daily pay an employee would receive under subsection (1) had the vacation been taken in an unbroken period.

Weekly Rest Period

A weekly rest period of 24 hours is currently provided all employees in New Brunswick except those determined to be in emergency situations, and those working for 5 or fewer hours on a daily basis. It is considered a violation of the Act to require any other employee to work 7 consecutive days per week. In the light of the burgeoning part-time sector, we would move to reduce, though not entirely eliminate, the entitlement threshold for the part-time working sector. We

are aware of part-time working situations in which the task requires only a few hours per day, but it must be performed each day. In such situations we see no benefit we would be offering the employee by disrupting the working contract.

Concepts Expressed in Legislative Terms

It is thereby suggested that subsection 17(1) be amended as follows:

> 17(1) Where an employe employs an employee other than
>
> (a) an employee who, in the opinion of the Director, is required to cope with an emergency; or
>
> (b) an employee who is not usually employed for more than three hours in any one day;
>
> the employer shall give to the employee a weekly rest period of at least twenty-four consecutive hours, to be taken, if possible, through Sunday or, if the Director approves, to be accumulated and taken later, either part at a time or all together.

PARENTAL LEAVE

Introduction

Insofar as parental leave in New Brunswick is concerned, the **Employment Standards Act** currently provides for maternity leave. Under the **Act**, a birth mother is entitled to 17 weeks unpaid maternity leave, based on the understanding that she needs 6 weeks for recuperation following delivery and 11 weeks at home with the child for bonding and other personal adjustment purposes.

This legislation is undoubtedly beneficial. This said, however, it is not unreasonable to suggest that maternity leave by itself is somewhat insufficient in light of contemporary family practices as these relate to parenting. In particular, the existing legislation does not take into account the following: (1) that fathers are assuming a greater responsibility at the birth of a child; (2) that many couples become parents through adoption; and, (3) that both parents in a household are increasingly employed members of the labour force.

These contemporary family practices raise questions concerning the adequacy and gender equity inherent in the existing legislation, particularly as it relates to males and adopting parents, and whether the existing legislation might be amended accordingly.

Generally speaking, the three contemporary family practices mentioned above are well documented, as are the

causes and the wide range of personal circumstances surrounding them. For this reason, they are not described in detail here. Suffice it to say that, while there are obvious differences between birth mothers and birth fathers, and between birth parents and adopting parents, there are also a great many similarities. Indeed, if the new Charter of Rights and Freedoms is used as a legislative backdrop for those similarities, there is every reason to believe that birth fathers and adopting parents are deserving of greater access to equal treatment under the law.

Toward this end, the following proposed minimum changes surrounding existing legislation are advanced for consideration.

First, that paternity leave and adoptive leave be equated with maternity leave in the legislation to the extent that a birth father or an adopting parent be entitled to an initial 6 weeks of unpaid leave, as is presently the case for birth mothers, and that both parents be entitled to a combined additional 11 weeks of unpaid parental leave.

Second, that a birth father or adopting parent taking up a parental leave option under such new legislation be required to meet the same advance notice requirements as presently apply to maternity leave.

Finally, at the expiration of any parental leave, the affected employee be permitted to resume employment in the

same or an equivalent position he or she held prior to taking the leave, with no loss in pay and benefits.

In legislative terms, this proposed action could be expressed as follows.

Concepts Expressed in Legislative Terms

PARENTAL LEAVE

43(1) An employee intending to take leave of absence under this section shall

a) in the case of a birth parent, advise his employer four months before the projected date of delivery or as soon as her pregnancy is confirmed, whichever is the later, of his intent to take leave and the anticipated commencement date in the absence of an emergency; and

b) in the absence of an emergency, give two weeks' notice to the employer of the commencement date of the leave; or

c) in the case of an adopting parent, give notice to his employer upon being approved as an adoptive parent by the Department of Health and Community Services or, in instances of private adoption, four months before the projected date of his adoption of a child or as soon as notice is given that the child becomes available for adoption, whichever is less, of his intention to take leave; and

d) in the absence of an emergency, give notice to his employer equivalent to the notice given that a child becomes available for adoption by the Department of Health and Community Services or, for private adoption, by the representative of the birth parent.

43(2) Subject to subsection (5), an employer shall at any time from a day eleven weeks before the specified date of delivery to the day of actual delivery, upon the request of a pregnant employee and upon the receipt of a certificate by a medical practitioner stating that the employee is pregnant and specifying the date upon which delivery will, in his opinion, occur, grant the

employee leave of absence without pay of six weeks or such shorter period as the employee requests.

43(3) Subject to subsection (5), an employer shall at any time from the anticipated commencement date given under paragraph 43(1)(b) or the notice given under paragraph 43(1)(d), upon the request of the employee grant the employee leave of absence without pay of six weeks or such shorter period as the employee requests.

43(4) Subject to subsection (7), leave of absence under subsections (2) or (3) may be taken during the period of time the employee stipulates in his request as long as the anticipated date of delivery or projected date of adoption falls within the stipulated period.

43(5) An employer shall upon the request of the employee grant the employee leave of absence without pay of an additional eleven weeks or such shorter period as the employee requests.

43(6) The aggregate amount of leave of absence that may be taken

a) by an employee under subsections (2) and (5) or (3) and (5) in respect of the birth or adoption of any one child shall not exceed seventeen weeks; and

b) by two employees under subsections (2) (3) and (5) or (3) and (5) in respect of the birth or adoption of any one child shall not exceed twenty-three weeks.

43(7) An employer may, where no alternative employment is available, before or after commencement of the period referred to in subsection (2), require the employee to commence a leave of absence at the time when the duties of her position cannot reasonably be performed by a pregnant woman or the performance of the work of the employee is materially affected by the pregnancy.

44(1) Where an employee reports for work upon the expiration of the period of leave granted under section 43, his employer shall permit him to resume work in the position he held immediately before the commencement of the leave or an equivalent position with no decrease in pay and with no loss of seniority or benefits accrued up to the commencement of the leave.

44(2) For the purposes of subsection (1), alternative employment referred to in subsection 43(7) shall not be considered as the position the employee held immediately before the commencement of the leave.

PAID PUBLIC HOLIDAYS

Introduction

The intention behind the provision for legislated paid public holidays is to enable workers to celebrate culturally and socially acceptable occasions without incurring any loss of wages.

New Brunswick's **Employment Standards Act** currently provides for six (6) paid public holidays. Insofar as paid public holidays in other provincial jurisdictions are concerned, the Yukon and Northwest Territories, British Columbia, and Saskatchewan have nine (9); Alberta has eight (8); Manitoba, Ontario, Québec, and Nova Scotia have seven (7); Newfoundland has five (5); and, Prince Edward Island has none.

Given that the average number of paid public holidays across Canada is 6.9 days, it is proposed that New Brunswick consider providing for one additional paid public holiday, and that said holiday be Thanksgiving.

There are three major reasons for suggesting Thanksgiving. First, when compared to other possibilities, it is probably the most widely and culturally acceptable social occasion presently being celebrated in the Province, but which is not a paid public holiday.

Second, Thanksgiving is already a statutory holiday under the **Days of Rest Act** and, as a result, is already a paid holiday for many workers.

Third, Thanksgiving is celebrated at a time of year that coincides with an almost regular employment downturn in many of New Brunswick's seasonal industries and businesses, and would therefore have limited financial implications for a large segment of the Province's employer community.

For these reasons then, it is proposed that consideration be given to including Thanksgiving as a paid public holiday by adding the following legislative provisions to the **Employment Standards Act.**

Concepts Expressed in Legislative Terms

1 In this **Act**

"public holiday" means New Year's Day, Canada Day, Labour Day, Christmas Day, Good Friday, New Brunswick Day and Thanksgiving, and includes any day substituted for one of those days under this Act;

23 Where any class of employers or employees is covered by a collective agreement that became effective after December 31, 1988 and provides for a minimum of seven paid holidays, including New Brunswick Day, that class of employers or employees is exempted from the application of sections 18 to 21.

OVERTIME PAY

Introduction

The **Employment Standards Act** currently contains several provisions related to hours of work. In broad terms, and subject to Sections 17, 39 and 41, Section 14 provides that there is no limit on the number of hours an employee may work during any daily, weekly, or monthly period.

On the closely associated wage front, Sections 9, 15 and 16 establish the minimum wages for workers, including the minimum overtime wage rate for time worked in excess of 44 hours per week.

These provisions notwithstanding, in comparison to some other provincial jurisdictions, employers in New Brunswick have considerable flexibility under the **Act**. This is especially true in the case of establishing the number of hours to be worked, and in establishing the rate of pay for overtime worked.

While it is probably desirable for legislation to retain some flexibility, in the case of the **Employment Standards Act** in particular this flexibility should not be at the expense of either workers or employers. Presently, there is evidence that the **Act** does, to some extent, retain the potential for workers to receive less than desirable wage treatment. More specifically, it happens that some New Brunswick employees frequently work in excess of 44 hours per week with these additional hours being remunerated at the minimum overtime

wage rate prescribed by regulations, which is less than their regular wage rate.

In order to redress this situation, the following proposed amendment to section 16 is advanced for consideration.

Concept Expresssed in Legislative Terms

16 Where a regulation is in effect under subsection 15(1), an employee who works for an employer in excess of the prescribed maximum hours of work shall be paid by the employer at a rate of not less than his regular wage rate or one and one-half times the minimum wage rate, whichever is greater.

It is worth mentioning that, were this proposed amendment enacted, it would not deprive employers of any flexibility. Employers would still have the option of deciding whether regular workers, or others, would be used to work any additional hours. Should they decide to use the former, however, those workers would be eligible to receive appropriate wage compensation for additional hours worked.

DEFINITIONAL PRECISION

Introduction

When there is disagreement over the interpretation of any piece of legislation, it is sometimes the exact wording of the particular law that is to blame. At present, there are three subsections in the **Employment Standards Act** wherein the actual phraseology used is not sufficiently clear to avoid confusion or disagreement. These three subsections and the difficulties they present are as follows:

The first is subsection 22(2) which allows the possiblity for payment of 3% of gross pay to the employee as an equivalent to the public holiday benefits prescribed by the statute. However, "pay" as defined under the **Act** includes public holiday pay. This leads to mathematical headaches **ad infinitum** for those who make a literal interpretation of the subsection. Thus, a substitution of "gross wages" is suggested for "gross pay", as the definition of wages specifically excludes any mention of benefits of any kind. Such an amendment would restore the original intent of the **Act** to allow a benefit of a 3% payment of gross wages as a substitute for receiving pay for public holidays.

A second interpretive dilemma occurs with subsection 35(2) which outlines when payment should be made to an employee following the close of a pay period. This subsection decrees that on a payday an employee shall receive all wages earned up to and including a day that is not more than five working days prior to the time fixed for payment.

Recognizing that many factors can influence the planned work schedule in a workplace, the intent of the legislation is to permit the payment of wages earned up to, but excluding, the latest work week, thus protecting an employer from having to reconcile his payroll records at a later date because some of the time for which payment was made was not time actually worked.

In order to clarify the intent behind subsection 35(2), it is proposed that the concept of working days be based on an equivalence in calendar days.

Subsection 25(2) is the third part of the Act which requires clarification. This subsection currently defines "earnings" for the purpose of determining an employee's vacation pay. The original intent of this provision was to provide for a 4% gross payment of earnings as vacation pay. This percentage was to be based upon all employment earnings over a specific time period. Where public holidays fell within that period of time, the pay received for paid public holidays was to be considered under the definition of earnings. However, as part of the confusion surrounding the original definitions of "earnings", "pay" and "wages" for purposes of subsection 25(2), inclusion of public holiday pay was omitted. The objective of the proposed amendment to subsection 25(2) is to capture fully the intent of this original provision.

In legislative terms, these three proposed amendments are as follows:

Concepts Expressed in Legislative Terms

22(2) For the purpose of subsection (1) a payment of three per cent of gross wages is equivalent to the public holiday benefits as prescribed by this Act.

35(2) An employer shall, when paying an employee, include all wages earned up to and including a day that is not more than seven calendar days prior to the time fixed for payment.

25(2) For the purpose of this section and section 26, "earnings" means the wages received or receivable by an employee for work done by him for an employer and includes public holiday pay and the cash value of board or lodging provided by the employer as established

a) by agreement between the employer and employee; or
b) in the absence of such agreement, by order of the Director

RECONCILIATION WITH OTHER LEGISLATION

Introduction

Notice of termination of employment provisions, found in sections 30 and 31 of the **Employment Standards Act**, provide employees with a reasonable period of adjustment while still employed to seek alternate employment, and to make other arrangements associated with their pending job loss. Upon failure to serve such notice, employers are required to provide employees with payments equivalent to the pay they would have received, had the appropriate period of notice been given.

Through this pay in-lieu-of notice mechanism, it was intended to maintain some semblance of the advance notice principle by enabling terminated employees to make at least some financial adjustment in the event of job loss. However, recent changes to the federal **Unemployment Insurance Act** has undermined this provincial legislative provision by deeming such termination payments as earnings for purposes of determining eligibility for unemployment insurance benefits.

To limit the impact of this federal change on New Brunswick Workers, amendments to the **Employment Standards Act** could be made in respect of the timing for payment of all outstanding pay.

Since all earnings received during the standard two-week unemployment insurance waiting period are deducted from unemployment insurance benefits in a manner less detrimental

to an employee's unemployment insurance claim than are any earnings received beyond that time period, it would be to an employee's benefit to ensure to the extent possible that all termination or other outstanding pay be received during the two-week period. Furthermore, given that single payments are treated differently than earnings payable in respect of weeks, the allocation of pay in lieu of notice in two weekly instalments should reduce the delay to rightful unemployment insurance entitlement.

To preserve for New Brunswick workers, as much as possible, their period of adjustment as mandated under provincial legislation, it is proposed section 37 of the **Employment Standards Act** be modified to enable terminated employees to receive all outstanding pay within two weeks beyond the last date worked, through reducing the current twenty-one day period to a twelve-day period.

Concepts Expressed in Legislative Terms

In legislative terms, this kind of action would require the following:

37(1) Subject to subsection (2), where an employee ceases to be employed by an employer the employer shall pay to the employee all outstanding pay or other outstanding benefits not later than twelve calendar days immediately following the last day the employee was employed.

37(2) Where payment in lieu of notice is due in accordance with section 34 to an employee by the employer, such payment shall be paid by the employer in two equal weekly instalments beginning with the first full calendar week following termination of employment and shall be allocated to such weeks accordingly.

SICK LEAVE

Introduction

Workers in New Brunswick who are unable to perform their duties due to illness are presently granted sick leave exclusively on the basis of the unregulated individual policies of their employers. While many employers do provide reasonable sick leave benefits for their employees, some employers do not. In the latter case, the affected employees are all too often faced with the unfortunate and comparatively unfair prospect of either having to work while ill, or of losing their jobs.

Generally speaking, the major cumulative effects accruing from the absence of sick leave benefit provisions are three-fold. First, there is the immediate threat that a contagious illness might be transmitted to co-workers and the general public, and thereby have a direct negative impact on both productivity and the employer's competitive advantage in the marketplace.

Second, there is the potential over time for reduced employee loyalty, as well as for increased employee attrition, both of which could also impact negatively on productivity and competitive advantage, albeit less directly.

Third, since it is not unreasonable to suggest that the majority of people do not intentionally become ill, it is important that some balance be struck between the need to remove an ill worker from the workplace and that worker's need for stable and secure employment.

In the best interests of employees and employers alike then, this paper holds that some minimum employment standards legislation surrounding sick leave is worthy of consideration, and that the guiding principle for such legislation is to avoid to the extent possible any potential for abuse.

Concepts Expressed in Legislative Terms

Against the backdrop of the preceding discussion, it is proposed that protection be provided employees in cases of occasional contagious illness. Toward this end, it is proposed a new section 27.1 be created under the **Employment Standards Act** with the following provisions:

27.1(1) This section does not apply in respect of employees who are covered by an indemnity plan under a collective agreement or paid for by an employer under which employees are entitled to coverage due to illness.

27.1(2) Where an employee incurs a contagious illness, he shall immediately notify in writing his employer and within 24 hours produce a certificate from a qualified medical practitioner certifying that the employee is unable to report for work because of contagious illness and specifying the date upon which the employee will, in his opinion, return to work.

27.1(3) Where a notice is given pursuant to subsection (2), the employer shall grant the employee sick leave without pay for the number of days claimed up to thirty calendar days.

BEREAVEMENT LEAVE

Introduction

It is an established fact that the death of a family member is a particularly difficult experience with far-reaching implications. Insofar as this relates to the workplace for example, the death of a spouse, child, parent, sibling, or other close relative cannot help but reduce to some extent, and for varying periods of time, an affected employee's performance.

In recognition of this, and in many instances out of a strong sense of compassion as well, some employers already provide a short period of bereavement leave as a matter of policy. Such action must certainly be appreciated, and is commendable. Unfortunately, however, this kind of action does not extend across the entire employer community, and in some instances bereaved workers have been threatened with, or have actually experienced, job loss.

To offset such negative effects surrounding bereavement for employers and employees alike, it is proposed that certain minimal changes to the **Employment Standards Act** be considered. Generally speaking, it is proposed that workers be permitted to take a maximum of five (5) consecutive calendar days of unpaid leave at the death of a spouse or child, and a maximum of three (3) consecutive calendar days of unpaid leave at the death of a parent, parent-in-law, sibling, and sibling-in-law.

Concepts Expressed in Legislative Terms

Following from the preceding discussion, it is proposed that a new section 27.2 be created under the Act with the following provisions:

27.2(1) An employee intending to take leave of absence under this section shall advise his employer of his intention to take leave and the anticipated commencement date.

27.2(2) Upon a notice given pursuant to subsection (1), an employer shall grant to the employee an unpaid leave of absence of:

a) five calendar days at the death of a spouse or child; or

b) three calendar days at the death of a parent, parent-in-law, sibling, or sibling-in-law;

to be taken during the bereavement period and to commence not later than the day immediately preceeding the funeral.

ETHICS IN THE WORKPLACE

Introduction

Bringing ethical values into the workplace can be a very real and threatening issue for employees when the reporting of information against an employer with respect to any violation under provincial and federal statutes leads to retaliatory job loss. When employees are aware that an employer is undertaking unsafe, unhealthy, or other illegal practices, there is some moral obligation for employees to report those practices before the health or security of others become threatened. However, employees often must balance such ethically laudable action against what they feel may well be a guaranteed termination of employment.

The current economic situation provides employees with little opportunity to disregard the possibility of lost employment. Thus, the likely outcome to this dilemma is either employees report and take a risk with respect to job security, or the decision is made not to report, thus augmenting and perhaps sanctioning the danger to the general public. Were employees protected from any retaliatory employer action in such circumstances, there would be less pressure on employees to ignore the ethics of work and, by extension, a better protected public. These ends are certainly desirable, and could be attained through an amendment to section 28 of the **Employment Standards Act**.

Concepts Expressed in Legislative Terms

Towards this end, it is proposed a new paragraph (c) be added to section 28 thereby modifying it as follows:

28 Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefor is related in any way to

a) the application by an employee for any leave to which the employee is entitled under this Act; or

b) the making of a complaint or the giving of information or evidence by the employee against the employer with respect to any matter covered by this Act; or

c) the giving of information or evidence by the employee against the employer with respect to the violation by the employer of any federal or provincial statute while carrying out the business for which he is an employer; or

if the dismissal, suspension, layoff, penalty, discipline or discrimination constitutes in any way an attempt by the employer to prevent or inhibit an employee from taking advantage of any right or benefit granted to him under this Act or an attempt by the employer to evade any responsibility imposed upon him under this Act or any federal or provincial statute with which he must comply in the day to day conducting of his business.

AUTHORIZED LEAVES OF ABSENCE

PREFACE

The principle of seniority and its associated practices have broad and important implications for workers and employers alike. These implications range all the way from some workers receiving relatively preferential treatment based on length of service for purposes of promotion, to employers having to tailor working conditions and renumeration for their employees, or groups of employees, on the same basis. Furthermore, in the field of labour relations generally, seniority has become a matter of customary privilege to the extent that seniority provisions are set out in considerable detail in most collective agreements and effectively regulate a wide variety of working conditions.

In those situations where seniority is used as a means to regulate certain working conditions, one of two measures is typically utilized to determine accrued seniority, namely, the length of service with the employer, or the actual number of days worked for the employer. In the case of the latter measure, actual number of days worked, this is also used to determine entitlement to selected legislated standards of employment.

During the 1986 session of the legislature, a bill was introduced to amend subsection 44(1) of the **Employment Standards Act** to protect female workers against any loss of seniority while on maternity leave. When this amendment was defeated, the government indicated the matter required some

consultation with labour and industry before further legislation could be considered.

Toward this end, and in the context of how some of the proposals presented elsewhere in this document have been developed, the following discussion describes a variety of leave of absence situations and how they can reasonably be addressed through seniority.

Leaves of Absence

Most workers can be reasonably expected to take leaves of absence from the workplace at various times and for varying durations. Typically, most leaves of absence are precipitated by one or more of the following: the need for a regular period of rest away from the workplace, the birth of a child, the death of a loved one, or personal or family illness.

Under the existing **Employment Standards Act**, workers are entitled to leaves of absence for purposes of taking annual vacations and public holidays. Since workers in the Province enjoy this entitlement, it can be reasonably assumed that they also receive sameness of treatment, notwithstanding any special arrangements based on seniority and made through the collective bargaining process. This being the case, only occasional leaves of absence, namely, those involving bereavement, illness, and parenting pose questions concerning seniority.

Generally speaking, bereavement leave and sick leave are of fairly short duration. By comparison, parental leave is usually much longer. When seniority accrual provisions are not in place to cover such leaves of absence, employment security can easily be threatened, particularly in layoff situations where the guiding principle is "last-in, first-out". Thus, a major benefit to be gained from providing for seniority accrual in such leave cases would be the elimination of a certain measure of employment security vulnerability for workers.

Many major employers, cognizant that good human resource policies positively affect employee productivity and loyalty, have adopted practices whereby seniority accrues during authorized leaves of absence. Indeed, in maximizing employee satisfaction through social advantages, these employers are actually securing their own competitive advantage and economic security. The practical acceptance of this principle, that seniority should accrue during leaves of absence, can be enjoyed either through increased adoption as a matter of business policy or, if warranted, through legislation.

The relative importance of small employers, most of whom do not provide for seniority schemes, highlights the fact that any modification to existing employer practices will have a limited impact. However, the psychological reaction of employees to such a change could be profound. The thought of being treated equally and its adjunct comforts should enrich relationships between co-workers and between employers and

employees, thereby creating an atmosphere more conducive to productivity.

Given these observations, it is felt that seniority legislation should reaffirm, in a flexible fashion, good business practices. Although it might be argued that any modifications would be more cosmetic than anything else, the effect of entrenching this principle of seniority in legislation should cater to fostering an improved climate of mutual trust and understanding in the workplace.

Existing Legislation

Under subsection 24(3) of the **Employment Standards Act**, the principle of equating days worked with days on paid leave is observed. This principle, which deems employees to have worked on any day for which they were paid, is applicable solely to the vacation provisions. By not extending this principle to other provisions of the legislation, an entitlement threshold was created whereby an employee taking vacation time off immediately preceding a public holiday might not be entitled to receive pay for the latter.

To avoid this kind of situation, it is suggested that the seniority principle be extended to paid leave provisions, namely, vacation leave and public holidays.

Complement to the above is seniority retention while on unpaid leave. Under section 44 (the provisions for maternity leave), seniority accrual ceases on the date the leave

commences. The legislation assumes, albeit implicity, that the employer's practices should govern while the employee is on leave without pay. Notwithstanding the adequacy of many existing employer policies, it would seem reasonable for legislation to alleviate any potential areas of concern for employees through a proper recognition of authorized unpaid leaves of absence.

Guided by the foregoing discussion, the following series of corrective actions is presented for consideration:

1. That a subsection be created whereby a employee who is granted leave of absence under the **Act** would continue to accrue seniority during the period of leave in the same fashion he would have accrued seniority had he worked during that period of time;

2. That the principle found in subsection 42 of the **Act** be made universal to authorized leaves of absence provided under the legislation; and

3. That the principle found in subsection 24(3) of the **Act** be made universal to paid leaves under the statute.

For ease of reference, these proposed measures were written in legislative terms as follows:

Concepts Expressed in Legislative Terms

LEGISLATED LEAVE

44.2(1) Where a leave of absence is taken in accordance with the Act, the employee is entitled to accumulate seniority credits during the period of leave granted at the same rate he would have accumulated credits had he worked during that period.

44.2(2) An employer shall not dismiss, suspend or lay off an employee who has been granted a leave of absence in accordance with the Act.

44.2(3) An employee shall be deemed to have worked on a day of vacation and a public holiday for which he was paid.